No. 93-52

Supreme Court, U.S.
FILED
JUL 8 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN NICHOL CLAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Under 18 U.S.C. 3565(a) (1988 & Supp. III 1991), a defendant who was originally sentenced to a term of probation and who is found to have violated a condition of her probation ordinarily may be continued on probation or may have her sentence of probation revoked, in which case the court may impose any other sentence "that was available" at the time of the defendant's original sentence. If the defendant is found to be in possession of a controlled substance, however, the court must revoke the sentence of probation and must sentence the defendant to "not less than one-third of the original sentence." The question presented is whether the court of appeals erred in concluding that the phrase "original sentence" as used in Section 3565(a) refers to the maximum term of imprisonment under the Sentencing Guidelines sentencing range applicable to the defendant at the time of her original sentencing hearing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	7
Appendix A	1a
Appendix B	14a
Appendix C	15a
Appendix D	23a

TABLE OF AUTHORITIES

Cases:

United States v. *Byrkett*, 961 F.2d 1399 (8th Cir. 1992)	4, 6
United States v. *Corpuz*, 953 F.2d 526 (9th Cir. 1992)	4, 6
United States v. *Diaz*, 989 F.2d 391 (10th Cir. 1993)	6
United States v. *Gordon*, 961 F.2d 426 (3d Cir. 1992)	4, 6
United States v. *Granderson*, 969 F.2d 980 (11th Cir. 1992), cert. granted, No. 92-1662 (June 28, 1993)	4, 6, 7

Statutes:

18 U.S.C. 1708	2
18 U.S.C. 3565 (1988 & Supp. III 1991)	5
18 U.S.C. 3565(a) (1988 & Supp. III 1991)	2, 3, 4, 5, 6
18 U.S.C. 3571	2
18 U.S.C. 3583(g)	5

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN NICHOL CLAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 982 F.2d 959. The orders of the district court (App., *infra*, 14a, 15a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1993. A petition for rehearing was denied on April 6, 1993. App., *infra*, 23a-24a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In pertinent part, 18 U.S.C. 3565(a) (1988 & Supp. III 1991) provides:

> If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may * * *
>
> (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A [*i.e.*, 18 U.S.C. 3551-3559, the general sentencing provisions,] at the time of the initial sentencing.
>
> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance * * * the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

STATEMENT

1. Pursuant to a guilty plea entered in the United States District Court for the Middle District of Tennessee, respondent was convicted on one count of knowing possession of government checks stolen from the mail, in violation of 18 U.S.C. 1708. The statutory maximum sentence for respondent's offense was five years' imprisonment and a $250,000 fine. See 18 U.S.C. 1708, 3571. Under the Sentencing Guidelines, the potential imprisonment range, in light of respondent's adjusted offense level and criminal history category, was one to seven months. App., *infra*,

2a. The district court imposed a sentence of three years' probation. The conditions of probation included the requirements that respondent not use or possess illegal drugs and that she participate in a drug treatment program. *Id.* at 2a; C.A. App. 22-23.

On February 25, 1992, respondent's probation officer filed a petition for revocation of respondent's probation, alleging in part that respondent had submitted three urine specimens that tested positive for cocaine. C.A. App. 26. The district court issued an arrest warrant charging respondent with violating the terms of her probation by, *inter alia*, possessing and/or using illegal drugs. App., *infra*, 3a.

2. On March 30, 1992, the district court held a probation revocation hearing. Respondent denied that she had possessed or used illegal drugs. Based on the government's evidence that respondent had tested positive for cocaine, however, the district court found that respondent had violated the conditions of her probation by using and possessing cocaine. The court expressly rejected respondent's contention that the positive drug tests could have been produced by passive inhalation. Accordingly, the court revoked respondent's probation. App., *infra*, 3a, 14a; 3/30/92 Probation Revocation Hearing Tr. 2.

The district court held a sentencing hearing on April 20, 1992. Applying 18 U.S.C. 3565(a) (1988 & Supp. III 1991), the district court held that it was required to sentence respondent to a term of imprisonment that was at least one-third the length of respondent's original sentence of probation. The court reasoned that the phrase "original sentence" as used in Section 3565(a) referred to the original sentence of probation that was actually imposed on respondent. 4/20/92 Sentencing Hearing Tr. 15. Accord-

ingly, the court concluded that Section 3565(a) required that respondent be sentenced to a term of at least 12 months' imprisonment—one-third of the original three-year sentence of probation. *Ibid.* The court sentenced respondent to 15 months' imprisonment, to be followed by a three-year period of supervised release. App., *infra*, 3a, 18a-19a.

3. The court of appeals vacated and remanded for resentencing. App., *infra*, 1a-13a. The court began its discussion by noting the existence of a circuit conflict on the meaning of the phrase "original sentence" as used in 18 U.S.C. 3565(a) (1988 & Supp. III 1991). *Id.* at 5a (citing *United States* v. *Granderson*, 969 F.2d 980, 982-985 (11th Cir. 1992), cert. granted, No. 92-1662 (June 28, 1993); *United States* v. *Gordon*, 961 F.2d 426, 430-433 (3d Cir. 1992); *United States* v. *Byrkett*, 961 F.2d 1399, 1400-1401 (8th Cir. 1992); *United States* v. *Corpuz*, 953 F.2d 526, 528-530 (9th Cir. 1992)). The court conceded that the Sentencing Reform Act of 1984 describes probation as a type of "sentence," and that it is therefore "possible to understand 'original sentence' to encompass a sentence of probation." App., *infra*, 6a. Nonetheless, because "[p]robation * * * has traditionally been viewed not as a sentence of punishment, but as 'a period of grace,' " the court held that "the onus was on Congress to make it absolutely clear where 'sentence' is to refer to a 'sentence of probation.' " *Ibid.*

The court then explained that the phrase "original sentence" ought not be interpreted to mean "original sentence of probation" because "three years of probation cannot be equated with three years of imprisonment." App., *infra*, 7a. Moreover, the court rea-

soned that construing the phrase "original sentence" to refer to the sentence originally available under the Sentencing Guidelines would do less violence to the sentencing scheme established in other portions of Section 3565, under which a defendant whose probation is revoked must be given "any other sentence" that "was available" at the time of the initial sentencing. *Id.* at 8a-9a. In addition, the court noted that 18 U.S.C. 3583(g), which requires revocation of supervised release when a defendant is found to have possessed illegal drugs, expressly requires the defendant "to serve in prison not less than one-third of the term of supervised release." App., *infra*, 10a (quoting 18 U.S.C. 3583(g)). The court concluded that Congress's use of different verbal formulations in Sections 3565(a) and 3583(g) indicated that Congress intended the provisions to be construed differently. *Ibid.*

Finally, the court of appeals reasoned that construing the phrase "original sentence" to refer to the original sentence of probation would violate the spirit of the Guidelines by requiring what amounts to an upward departure in the absence of the "reasoned statement" generally required for such departures. App., *infra*, 11a-13a. For those reasons, and because the rule of lenity requires courts to "err on the side of lesser penalties," the court of appeals concluded that the phrase "original sentence" as used in Section 3565(a) "refers to the sentencing guidelines imprisonment range for the underlying offense." App., *infra*, 13a. Accordingly, the court vacated respondent's sentence and remanded with instructions to have respondent released immediately if she had already served more than the maximum sentence allowable under the applicable Guidelines range. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the same question at issue in *United States* v. *Granderson*, cert. granted, No. 92-1662 (June 28, 1993), *i.e.*, whether the phrase "original sentence" as used in 18 U.S.C. 3565(a) (1988 & Supp. III 1991) refers to the original sentence of probation that was actually imposed on a defendant or refers instead to the maximum term of imprisonment under the Sentencing Guidelines sentencing range applicable to the defendant at the time of her original sentencing hearing. We submit that the court below, like the court of appeals in *United States* v. *Granderson*, *supra*, erred in holding that the phrase "original sentence" refers to the Guidelines range rather than to the sentence of probation actually imposed.* A decision for the United States in *Granderson* would require a decision for the United States in the instant case.

---

* Two other circuits have construed Section 3565(a) in the same manner as the *Granderson* court and the court below. See *United States* v. *Diaz*, 989 F.2d 391 (10th Cir. 1993); *United States* v. *Gordon*, 961 F.2d 426 (3d Cir. 1992). The Eighth and Ninth Circuits have reached the opposite conclusion. See *United States* v. *Byrkett*, 961 F.2d 1399 (8th Cir. 1992); *United States* v. *Corpuz*, 953 F.2d 526 (9th Cir. 1992).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Granderson*, No. 92-1662, and then disposed of in light of the Court's disposition of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

JULY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 92-5562

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LASHAWN NICHOL CLAY, DEFENDANT-APPELLANT

Argued Nov. 20, 1992

Decided Jan. 6, 1993

Before: KEITH and JONES, Circuit Judges; and ALLEN, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judge.

Defendant-Appellant LaShawn Nichol Clay appeals the sentence imposed on her for violating 18 U.S.C. § 3565(a) (1988 & Supp. III 1991) by possessing a controlled substance while on probation. Section 3565 (a) requires a defendant whose probation is revoked due to possession of a controlled substance to be sen-

---

* The Honorable Charles M. Allen, Senior United States District Judge for the Western District of Kentucky, sitting by designation.

tenced to a term "not less than one-third of the original sentence." The issue presented is whether "original sentence" refers to the sentence of probation originally imposed, or to the maximum sentence of imprisonment that could have been imposed under the federal sentencing guidelines for the original offense. The district court took the former view. We take the latter, and are thus compelled to vacate Clay's sentence and remand the case for resentencing.

I. The Case

On March 21, 1990, Clay was indicted in the United States District Court for the Middle District of Tennessee on four counts of knowing possession of government checks stolen from the mail, in violation of 18 U.S.C. § 1708 (1988). She was arraigned on April 9, 1992, and entered a plea of not guilty at that time. On June 4, 1990, Clay tendered a plea of guilty to one count of the indictment. On August 30, 1990, the district court accepted this plea. The remaining counts were dismissed on motion of the government.

According to the United States Sentencing Commission's *Guidelines Manual* (Nov. 1989) [hereinafter U.S.S.G.], Clay had a criminal history category of I and an offense level of seven, resulting in a guidelines imprisonment range of one to seven months. On August 30, 1990, the district court sentenced Clay to three years of probation with the following conditions: (1) that she reside for thirty days in a drug treatment facility; (2) that she then reside for ninety days in a community treatment facility or halfway house; (3) that she participate in a drug treatment program which may require drug testing;

(4) that she pay restitution in the amount of $698; and (5) that she provide financial information as requested by a probation officer. Judgment was entered on August 31, 1990.

On February 27, 1992, the district court signed an arrest warrant charging that Clay had violated the conditions of her probation by possessing and/or using illegal drugs, failing to participate in a drug treatment program, failing to pay restitution, and failing to report changes in her residence. At a March 30, 1992 hearing, Clay admitted all of the charges except for the possession/use of illegal drugs charge. The district court heard the government's testimony that Clay's urine had tested positive for cocaine in January 1992, and rejected Clay's contention that the positive tests resulted from passive inhalation of cocaine smoke. The district court specifically found that she had violated the conditions of her probation by using cocaine. Clay's probation was revoked.

On April 20, 1992, pursuant to the district court's interpretation of 18 U.S.C. § 3565(a), Clay was sentenced to fifteen months of imprisonment and three years of supervised release. Judgment was entered on April 21, 1992. Clay timely appealed this sentence on April 22, 1992.

II. The Standard of Review

This case turns on the interpretation of a federal statute, namely, 18 U.S.C. § 3565(a). This being a legal issue, our review is *de novo*. *See United States v. Granderson*, 969 F.2d 980, 982 (11th Cir. 1992); *United States v. Gordon*, 961 F.2d 426, 429 (3d Cir. 1992); *United States v. Corpuz*, 953 F.2d 526, 527 (9th Cir.1992).

III. The Meaning of "Original Sentence"

In this case, we must construe a provision of 18 U.S.C. § 3565(a), which provides, in total:

> (a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—
>
> > (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
> > (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.
>
> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

Congress added the final paragraph as part of the Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690, § 7303(a)(2), 102 Stat. 4181, 4464 (1988) (codified at 18 U.S.C. § 3565(a)) [hereinafter '88 Act]. The district court interpreted the term, "original sentence," in this paragraph to mean the three years of probation it imposed upon Clay on August 30, 1990. The district court thus felt compelled to sen-

tence Clay to "not less than one-third" of three years, or at least twelve months. Clay argues that the "original sentence" is the maximum term of imprisonment under the sentencing guidelines for the original crime, or seven months.

Four other circuit courts have considered this very issue. The Third and Eleventh Circuits clearly support Clay's position. *Gordon*, 961 F.2d at 430-33; *Granderson*, 969 F.2d at 982-85. The Eighth and Ninth Circuits clearly support that of the government. *United States v. Byrkett*, 961 F.2d 1399, 1400-01 (8th Cir.1992); *Corpuz*, 953 F.2d at 528-30. In addition, at least one district court has recently reviewed this issue, taking Clay's position. *United States v. Roberson*, 805 F.Supp. 879 (D.Kan.1992). We are convinced that Clay's position is the better of the two alternatives.

A. Evaluating the Statutory Construction Arguments

1. Probation as "Sentence"

When Congress enacted the Sentencing Reform Act of 1984, Pub.L. No. 98-473, 98 Stat.1987 (codified as amended at 18 U.S.C. §§ 3551 *et seq.* (1988 & Supp. III 1991) and 28 U.S.C. §§ 991-98 (1988 & Supp. II 1990)), it intended to change the penological perception of probation. The committee report accompanying the statutory provision authorizing federal courts to impose probation instead of imprisonment in certain circumstances states: "In keeping with modern criminal justice philosophy, probation is described as a form of sentence rather than, as in current law, a suspension of the imposition or execution of sentence." S.Rep. No. 225, 98th Cong., 2d Sess. 88 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3271.

The version of 18 U.S.C. § 3561(a) that was passed into law reads: "A defendant who has been found guilty of an offense may be sentenced to a term of probation . . . ." The appropriate conditions and length of probation are to be determined with reference to the same factors that guide the sentencing court in deciding the proper term of imprisonment. 18 U.S.C. § 3562(a) (1988). Thus, it is possible to understand "original sentence" to encompass a sentence of probation. *See Corpuz*, 953 F.2d at 529.

Probation, however, has traditionally been viewed not as a sentence of punishment, but as "a period of grace," *Burns v. United States*, 287 U.S. 216, 220, 53 S.Ct. 154, 155, 77 L.Ed. 266 (1932), or as "conditional liberty," *Black v. Romano*, 471 U.S. 606, 611, 105 S.Ct. 2254, 2257, 85 L.Ed.2d 636 (1985). Given this traditional understanding of probation, the onus was on Congress to make it absolutely clear where "sentence" is to refer to a "sentence of probation," by including the appropriate modifying prepositional phrase or by making the meaning absolutely clear from the context. Without this clarification, the term "original sentence" should mean what it has always meant—a sentence of imprisonment. Given such lack of clarity, "original sentence" in 18 U.S.C. § 3565(a) must refer to the original sentencing guidelines imprisonment range. *Cf. Gordon*, 961 F.2d at 432.

2. Natural Interpretation

One might argue that the most natural interpretation of "original sentence" is simply the "sentence originally imposed," not the "maximum term of imprisonment possible but not imposed." *See Gordon*, 961 F.2d at 434 (Greenberg, J., concurring). Since

a sentence might involve probation, the "original sentence" might mean the sentence of probation actually imposed.

But three years of probation cannot be equated with three years of imprisonment. By interpreting "original sentence" to mean original sentence of probation, this equation is made. In the instant case, Clay was initially exposed to a maximum sentence under the guidelines of seven months of imprisonment. But through the magic of semantics, Clay became exposed to up to thirty-six months of imprisonment—for merely violating probation.[1] The *Gordon* court called this process "legal alchemy." *Id.* at 433.

Let us suppose, for purposes of argument, that Clay was convicted of simple possession of a controlled substance under 21 U.S.C. § 844(a) (Supp. II 1990), as opposed to merely being found in violation of the terms of her probation. The statutory maximum for this crime is one year of imprisonment. *Id.* Suppose also that she were resentenced upon violating her parole to the maximum term of imprisonment under the sentencing guidelines range for violating 18 U.S.C. § 1708 (her underlying offense). Her *maximum* exposure, should the sentences run consecutively, would be nineteen months of imprisonment. According to the government's interpretation of 18 U.S.C. § 3565(a) in this case, she would be exposed to roughly twice that.

---

[1] While the court in the instant case believed the government's account of why Clay tested positive for a controlled substance over Clay's account, the government did not have to prove its case beyond a reasonable doubt. *See Gordon,* 961 F.2d at 429.

Taking the government's position to its extreme, we note that, by statute, Clay *could have* received sixty months of probation for her initial crime. 18 U.S.C. § 3561(b) (1988). According to the government's position, had Clay received sixty months of probation and subsequently violated the terms of her probation by possessing a controlled substance, she could have been sentenced to a term of imprisonment that was 857% of the sentencing guidelines maximum term of imprisonment. And this sentence of imprisonment could have been imposed upon a mere "finding," 18 U.S.C. § 3565(a), that Clay had a trace of cocaine in her bloodtsream and that this constituted possession. *See Gordon*, 961 F.2d at 429. Thus, the "natural" interpretation of "original sentence," upon closer analysis, seems to defy common sense.

3. *"Original Sentence" in the Context of Section 3565*

Congress used the term, "original sentence," in the anti-drug abuse amendment to 18 U.S.C. § 3565(a). Located directly before the paragraph containing this amendment is 18 U.S.C. § 3565(a)(2), which states that, if a defendant is generally in violation of probation, the court may "revoke the sentence of probation and impose any other *sentence that was available under subchapter A* at the time of the initial sentence" (emphasis added). Located directly after the paragraph containing the amendment is 18 U.S.C. § 3565(b), which states that, if a defendant is found in possession of a firearm during probation, the court shall "revoke the sentence of probation and impose any other *sentence that was available under*

subchapter A at the time of the initial sentencing" (emphasis added). If Congress intended "original sentence" to mean "sentence that was available under subchapter A," why did it not use the specific and technical wording found directly before and after? It is possible to answer that Congress intended something different, namely, that "original sentence" means the sentence of probation actually imposed. *See Byrkett*, 961 F.2d at 1400-01.

But such an interpretation does violence to another basic principle of statutory interpretation. When interpreting the effect of a new law upon an old one, "[o]nly a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy." *Georgia v. Pennsylvania, R.R.*, 324 U.S. 439, 457, 65 S.Ct. 716, 726, 89 L.Ed. 1051 (1945). Without a clear expression of congressional intent to the contrary, we should try to reconcile, as much as possible, the anti-drug abuse amendment to the rest of Section 3565(a). *See Gordon*, 961 F.2d at 431. Before the anti-drug abuse amendment, the maximum sentence that could have been imposed after a violation of probation was the maximum sentence available at the time of initial sentencing. Interpreting "original sentence" to mean original sentence of probation may well take the new sentence of imprisonment out of the original sentencing guidelines range. By interpreting "original sentence" to refer to the sentence of imprisonment that could have been imposed originally, less violence is done to Section 3565(a)(2) in that, though the court's discretion is limited to a degree by the amendment, the new sentence of imprisonment must still fall within the original sentencing guidelines range of imprisonment.

4. *Analogies to the Supervised Release Provision*

As part of the '88 Act, Congress added the following language to 18 U.S.C. § 3583(g): "If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the *term of supervised release* and require the defendant to serve in prison not less than one-third of the *term of supervised release*." Pub.L. No. 100-690, § 7303(b)(2), 102 Stat. 4181, 4464 (1988) (codified at 18 U.S.C. § 3583(g)) (emphasis added). The language found in 18 U.S.C. § 3583(g) parallels that of 18 U.S.C. § 3565(a): "[I]f a defendant is found by the court to be in possession of a controlled substance . . . , the court shall revoke *the sentence of probation* and sentence the defendant to not less than one-third of the *original sentence*" (emphasis added). The antecedent of "term of supervised release" in 18 U.S.C. § 3583(g) is "term of supervised release." By analogy to 18 U.S.C. § 3583(g), it might be said that the antecedent of "original sentence" in 18 U.S.C. § 3565(a) is "the sentence of probation."

But the fact that Congress used the term, "term of supervised release," in Section 3583(g), but "original sentence" in Section 3565(a) "suggests that Congress intended to punish violations of supervised release and probation differently." *Gordon*, 961 F.2d at 431. In other words, given the parallel structures of the statutory provisions, we should assume that a marked semantic difference connotes an intended penological difference.

B. *Evaluating the Policy-Based Arguments*

1. *The Purpose of the Anti-Drug Abuse Amendment*

It might be argued that if "original sentence" refers merely to the maximum sentence under the guidelines that the defendant could have received if she or he had been sentenced to imprisonment instead of having been placed on probation, the anti-drug abuse policies which underlie the controlled substance provision of Section 3565(a) would be frustrated. Under the sentencing guidelines, probation is used only where the sentencing guidelines maximum imprisonment term is relatively small. *See* U.S.S.G. § 5B1.1(a). Requiring a sentence of merely one-third of an already paltry maximum would arguably do very little toward deterring substance abuse. *See Gordon*, 961 F.2d at 434 (Greenberg, J., concurring).

But *requiring* a court to impose a sentence of *imprisonment* of *at least* one-third of the original sentencing guidelines maximum imprisonment term furthers the goals of the anti-drug abuse amendment insofar as it builds a floor below which a sentencing judge may not go upon a defendant's revocation of probation for possession of a controlled substance. *See id.* at 433 n. 8.

2. *The Integrity of the Sentencing Guidelines*

The district court shall impose a sentence upon a defendant within the sentencing guidelines range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by

the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). In making a departure from the guidelines, the district court must provide a "specific reason" supporting it. 18 U.S.C. § 3553(c)(2) (1988). "This requirement is satisfied by 'a short clear written statement or a reasoned statement from the bench' that identifies the aggravating factors and its reasons for connecting them to the permissible grounds for departure." *United States v. Feinman*, 930 F.2d 495, 501 (6th Cir.1991) (quoting *United States v. Rodriguez*, 882 F.2d 1059, 1066 (6th Cir.1989), *cert. denied*, 493 U.S. 1084, 110 S.Ct. 1144, 107 L.Ed.2d 1048 (1990)).

Sentencing Clay to anything above seven months of imprisonment amounts to an upward departure from the guidelines without requiring a "reasoned statement" as to why the guidelines do not adequately take into consideration the circumstances of her case. A mere "finding" of the court that the Defendant was in possession of a controlled substance was enough to raise the maximum sentence, in this case, over 500%. While mere findings are enough to justify *adjustments*, *see United States v. Duque*, 883 F.2d 43, 44-45 (6th Cir.1989); *see also United States v. Beaulieu*, 900 F.2d 1531, 1535-36 (10th Cir.), *cert. denied*, 497 U.S. 1009, 110 S.Ct. 3252, 111 L.Ed.2d 762 (1990); *United States v. Mejia-Orosco*, 867 F.2d 216, 221 (5th Cir.), *cert. denied*, 492 U.S. 924, 109 S.Ct. 3257, 106 L.Ed.2d 602 (1989), they cannot justify *departures*. Interpreting "original sentence" to mean original sentence of probation essentially does an end run around the reasoned state-

ment requirement for departures. Such an interpretation thus does violence to how the sentencing guidelines are to be employed.

3. *Lenity*

When interpreting ambiguous criminal statutes, the policy of lenity comes into play. As the United States Supreme Court has stated, "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958). Applied to this case, the policy of lenity dictates that we err on the side of lesser penalties by interpreting "original sentence" to refer to the original sentencing guidelines imprisonment range. *See Granderson*, 969 F.2d at 983.

IV. *Conclusion*

On balance, we are persuaded that Clay's interpretation of 18 U.S.C. § 3565(a) is the better of the two alternatives. We hold that "original sentence" in 18 U.S.C. § 3565(a) refers to the sentencing guidelines imprisonment range for the underlying offense. Accordingly, we VACATE the sentence, and REMAND the case to the district court with instructions to have Clay released forthwith from confinement if she has been incarcerated for a period in excess of the maximum allowable under the applicable sentencing guidelines imprisonment range. The district court may then impose conditions upon her release from confinement that it deems meet and just, in accordance with the law of this circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-90-00065
Judge Higgins

UNITED STATES OF AMERICA

v.

LASHAWN NICHOL CLAY

ORDER

[Filed Mar. 31, 1992]

For the reasons stated on the record at the hearing on March 30, 1992, the defendant's probation is revoked.

Sentencing is set for Monday, April 20, 1992, at 10:00 a.m.

The defendant's bond is revoked for the reasons stated on the record, and she will be detained pending sentencing.

It is so ORDERED.

/s/ Thomas A. Higgins
THOMAS A. HIGGINS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Case Number: 3:90-00065
Judge Higgins

UNITED STATES OF AMERICA

v.

LASHAWN NICHOL CLAY

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After
November 1, 1987)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.

☒ was found guilty on count(s) violation of probation after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

18 USC 1708

Nature of Offense

Possession of stolen government checks

Date Offense Concluded	Count Number(s)
3-1-89	One

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ————————, and is discharged as to such count(s).

☐ Count(s) ———————— (is) (are) dismissed on the motion of the United States.

☐ It is ordered that the defendant shall pay a special assessment of $————————, for count(s) ————————, which shall be due ☐ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 410-15-8356

Defendant's Date of Birth: 9-9-69

Defendant's Mailing Address:
custody

Defendant's Residence Address:
3330A Doverside
Nashville, TN 37207

April 20, 1992
Date of Imposition of Sentence

/s/ Thomas A. Higgins
Signature of Judicial Officer

THOMAS A. HIGGINS
United States District Judge
Name & Title of Judicial Officer

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIFTEEN (15) MONTHS.

Sentence imposed for purposes of punishment and treatment.

The defendant was advised of her right to appeal.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district.

☐ at ——— a.m. / p.m. on ———.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on ———.

☐ as notified by the United States marshal.

☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ——— to ——— at ———, with a certified copy of this judgment.

United States Marshal

By ———
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☒ The defendant shall not possess a firearm or destructive device.

The defendant shall pay restitution in the total amount of $698; $117 to Kroger Company Credit Union, $357 to Bill Crooks Grocery Company and $224 to South Central Food Big Star. Restitution shall be paid in regular monthly payments not less than $20 a month unless otherwise directed by the probation office;

The defendant shall provide any financial information requested by the probation office;

The defendant shall participate in a drug treatment program which may require urine testing.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, dis-

tribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

☒ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Kroger Company Credit Union	$117
Bill Crooks Grocery Company	$357
South Central Food Big Star	$224

Payments of restitution are to be made to:

☐ the United States Attorney for transfer to the payee(s).

☒ the payee(s).

Restitution shall be paid:

☐ in full immediately.

☐ in full not later than ————————.

☐ in equal monthly installments over a period of —— months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☒ in installments according to the following schedule of payments:

as determined by the probation office.

Any payment shall be decided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-5562

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

LASHAWN NICHOL CLAY, DEFENDANT-APPELLANT

[Filed Apr. 6, 1993]

ORDER

BEFORE: KEITH and JONES, Circuit Judges; and ALLEN,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

---

* Hon. Charles M. Allen sitting by designation from the Western District of Kentucky.

The panel has further reviewed the petition and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60318

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

NO. 93-52

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RECEIVED
93 OCT 14 P5:38

UNITED STATES OF AMERICA,

Petitioner,

v.

LaSHAWN NICHOL CLAY,

Respondent.

ON PETITION BY THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent
LaShawn Nichol Clay

QUESTION PRESENTED FOR REVIEW

Title 18, United States Code § 3565(a) (1988 and Supp. III 1991) requires a defendant whose probation is revoked due to possession of a controlled substance to be sentenced to a term "not less than one-third of the original sentence." The question presented for review is whether "original sentence" refers to the period of imprisonment that could have been imposed at the time of the initial sentencing (pursuant to the sentencing guidelines) or to the term of probation actually imposed.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 9

ARGUMENT 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES CITED — PAGE(S)

Ladner v. United States, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958) 11

United States v. Alese, 1993 U.S. App. LEXIS 25110 (2d Cir. September 1993) 9

United States v. Byrkett, 961 F.2d 1399 (8th Cir. 1992) 9

United States v. Clay, 982 F.2d 959 (6th Cir. 1993) 2, 3, 4, 5, 6, 7, 10, 11

United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992) 4, 9

United States v. Diaz, 989 F.2d 392 (10th Cir. 1993) 9, 12, 13

United States v. Duque, 833 F.2d 43 (6th Cir. 1989) 8

United States v. Feinman, 930 F.2d 495 (6th Cir. 1991) 12

United States v. Gordon, 961 F.2d 426 (3d Cir. 1992) 7, 9, 11, 12, 13

United States v. Granderson, 969 F.2d 980 (11th Cir.), cert granted, No. 92-1662 (June 28, 1993) 9, 10

United States v. Rodriguez, 882 F.2d 1059 (6th Cir. 1989), cert. denied, 493 U.S. 1084, 110 S.Ct. 1144, 107 L.Ed.2d 1048 (1990) 12

United States v. Sosa, 997 F.2d 1130 (5th Cir. 1993) 9

OTHER AUTHORITY

Federal Rules of Criminal Procedure 32.1 2

STATUTES

18 U.S.C. § 1708 3

18 U.S.C. § 3553 . . . . . 2, 7, 11

18 U.S.C. § 3563 3

18 U.S.C. § 3565 . . . . i, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13

18 U.S.C. § 3583(g) 6, 7

28 U.S.C. § 1254(1) 2

NO. 93-52

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

LaSHAWN NICHOL CLAY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

LaShawn Nichol Clay, Respondent, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case entered on January 6, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as United States v. Clay, 982 F.2d 959 (6th Cir. 1993). The orders of the United States District Court for the Middle District of Tennessee are unreported. The text of the appellate opinion is included as Appendix A to the Government's Petition for a Writ of Certiorari. The text of the district court are included as Appendices B and C to the Government's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1993. A petition for rehearing was denied on April 6, 1993. (Government App. D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3565. Revocation of probation

> **(a) Continuation or revocation.**--If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable--
>
> > (1) continue him on probation, with or without extending the term or

> modifying or enlarging the conditions; or
>
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.
>
> Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

STATEMENT OF THE CASE

Pursuant to a guilty plea, LaShawn Nichol Clay was convicted in the United States District Court for the Middle District of Tennessee of one count of unlawful possession of a government check stolen from the mail, in violation of 18 U.S.C. § 1708. United States v. Clay, 982 F.2d 959, 960 (6th Cir. 1993). The statutory maximum punishment for the offense was up to five (5) years imprisonment and/or a fine of up to Two Hundred Fifty Thousand Dollars ($250,000). At the sentencing hearing on August 30, 1990, based upon a criminal history category I and a total offense level of seven (7), the district court found the applicable guideline range of imprisonment to be one (1) to seven (7) months. The district court sentenced Ms. Clay to probation for a term of three (3) years with the following special conditions:

> (1) that she reside for thirty (30) days in a drug treatment facility;

(2) that she then reside for ninety (90) days in a community treatment facility or halfway house;

(3) that she participate in a drug treatment program which may require drug testing;

(4) that she pay restitution in the amount of Six Hundred Ninety-Eight Dollars ($698); and

(5) that she provide financial information as requested by the probation office.

Id. at 961.

On February 27, 1992, a probation violation warrant was signed by the district judge, which alleged in part that Ms. Clay had violated the conditions of her probation by the possession and/or use of illegal drugs. At the probation violation hearing on March 30, 1992, the district court found that Ms. Clay had violated the conditions of her probation and found her guilty of the allegations in the probation violation warrant, including the use and possession of cocaine. The court revoked her probation and revoked her bond. Id.

On April 20, 1992, at the sentencing hearing, the district court adopted the Ninth Circuit's construction of 18 U.S.C. § 3565(a) as stated in United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992). The district court construed the phrase "original sentence" as used in § 3565(a), as meaning the original sentence of probation actually given. As the district court had given Ms. Clay a sentence of probation for a term of three (3) years, the court reasoned that the court was required to impose a term of imprisonment which was at least one-third of the three (3) years

probation. The court concluded that § 3565(a) required that Ms. Clay be sentenced to at least twelve (12) months imprisonment. The court sentenced her to fifteen (15) months imprisonment, to be followed by supervised release for a term of three (3) years. (*Probation Revocation Hearing Tr. 2*).

Ms. Clay appealed her sentence. The court of appeals vacated the sentence and remanded the case to the district court with instruction to have Ms. Clay released forthwith from confinement if she had been incarcerated for a period in excess of the maximum allowable under the applicable sentencing guidelines imprisonment range.[1] Id. at 965.

The court of appeals commenced its analysis by acknowledging that pursuant to the Sentencing Reform Act of 1984 probation is a type of sentence. However, as probation has traditionally been viewed not as a sentence of punishment, but a period of grace, the onus was on Congress to make it absolutely clear where "sentence" is to refer to a "sentence of probation," by including the appropriate modifying pre-positional phrase or by making the meaning absolutely clear from the context. The court further reasoned that without this clarification, the term "original sentence" should mean what it has always meant--a sentence of imprisonment. Given such a lack of clarity, "original sentence" in 18 U.S.C. § 3565 must refer to the original sentencing guidelines imprisonment range. Id. at 962.

---

[1]Ms. Clay was released from incarceration and placed on bond on January 8, 1993, pending the Government's petition for writ of certiorari.

Further, the court of appeals reasoned that three (3) years of probation cannot be equated with three (3) years of imprisonment. Had Ms. Clay received the maximum term of probation sixty of (60) months for her initial crime and subsequently violated the terms of her probation by possessing a controlled substance, she could have been sentenced to a term of imprisonment (of five years) that was 857 percent higher than the sentencing guideline maximum term of imprisonment. This interpretation of "original sentence," according to the court of appeals, seemed to defy common sense. Id. at 963.

Additionally, the court reasoned that without a clear expression of congressional intent to repudiated the law prior to the anti-drug abuse amendment to 18 U.S.C. § 3565(a), the court should try to reconcile the anti-drug abuse amendment to the rest of § 3565(a). Before the anti-drug abuse amendment, the maximum sentence that could have been imposed after a violation of probation was the maximum sentence available at the time of the initial sentencing. Interpreting "original sentence" to mean an original sentence of probation may well take the new sentence of imprisonment out of the original sentencing guideline range. By interpreting "original sentence" to refer to the sentence of imprisonment that could have been imposed originally, less violence is done to § 3565(a)(2) in that, though the court's discretion is limited to a degree by the amendment, the new sentence of imprisonment must still fall within the original sentencing guideline range of imprisonment. Id. The court of appeals also

made an analogy to the supervised release provision. The court reasoned that given the parallel structure of the statutory provisions, the court should assume that the marked somatic difference connotes an intended penalogical difference. Id at 964.

The court of appeals further recognized that *requiring* a court to impose a sentence of *imprisonment of at least* one-third of the original sentencing guideline maximum imprisonment term advances the goal of the anti-drug abuse amendment insofar as it builds a floor below which a sentencing judge may not go upon a defendant's revocation of probation for possession of a controlled substance. Id. (citing U.S. v. Gordon, 961 F.2d 426, 433, n.8).

The court of appeals' analysis of the statute maintains the integrity of the sentencing guidelines. Pursuant to 18 U.S.C. § 3553(d) (1988), the district court shall impose a sentence upon a defendant within the sentencing guideline range,

> unless the court finds that there exists an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Title 18, U.S.C. § 3553(c)(2) (1988) requires a district court to provide specific reason to support a departure from the guidelines. The court reasoned that sentencing Ms. Clay to anything above seven (7) months of imprisonment would amount to an upward departure from the guidelines without requiring a "reasoned statement" as to why the guidelines do not adequately take into consideration the circumstances of her case. There was a finding of the district

court that Ms. Clay was in possession of a controlled substance. *While mere findings are enough to justify adjustments,* see United States v. Duque, 833 F.2d 43, 44-45 (6th Cir. 1989), *they cannot justify departures.* Id. The court of appeals further reasoned that interpreting "original sentence" to mean original sentence of probation essentially ignores the reasoned statement requirement for guideline departures and how the guidelines are to be employed. Id. at 964-65.

Finally, the court of appeals concluded that 18 U.S.C. § 3565(a) is an ambiguous statute. When interpreting ambiguous criminal statutes, the policy of lenity comes into play. And as applied in this case, and following the authority of this Court, the policy of lenity dictated that the court err on the side of the lesser penalties by interpreting "original sentence" to refer to the original sentencing guideline imprisonment range. Id. at 965. The court accordingly vacated the sentence and remanded the case to the district court with instructions.

REASONS FOR DENYING THE WRIT

Respondent acknowledges that this case presents the same issue as United States v. Granderson, 969 F.2d 980 (11th Cir.), cert. granted, No. 92-1662 (June 28, 1993). Respondent also acknowledges that a circuit split does exist on the interpretation of the phrase "original sentence" in 18 U.S.C. § 3565(a). However, Respondent submits that certiorari is not needed in this case because the decision of the United States Court of Appeals for the Sixth Circuit in this case is correct and consistent with United States Supreme Court precedent, common sense, and public policy. Furthermore, Respondent submits that only three circuits support the Government's position, United States v. Sosa, 997 F.2d 1130 (5th Cir. 1993), United States v. Byrkett, 961 F.2d 1399 (8th Cir. 1992) (per curiam); and United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992). The circuits supporting the Respondent's position are United States v. Alese, 1993 U.S. App. LEXIS 25110 (2d Cir. September 1993); United States v. Gordon, 961 F.2d 426 (3d Cir. 1992); United States v. Diaz, 989 F.2d 392 (10th Cir. 1993); and United States v. Granderson, 969 F.2d 980 (11th Cir.), cert. granted, No. 92-1662 (June 28 1993). The Fifth, Eighth, and Ninth Circuits should have an opportunity to reconsider this issue en banc to determine whether the panel opinions should be overruled in light of the significant recent precedent of its sister circuits rejecting their panel's analysis. This Court's intervention may never be necessary to resolve the conflict among the circuits.

ARGUMENT

The court of appeals in United States v. Clay, 982 F.2d 959 (6th Cir. 1993), was correct in its interpretation of the phrase "original sentence" in 18 U.S.C. § 3565(a) and its opinion provides a very comprehensive analysis of this issue. The court acknowledged that pursuant to the Sentencing Reform Act of 1984 probation is a sentence. Id. at 962; United States v. Granderson, 969 F.2d 980, 982 (11th Cir.) cert. granted, No. 92-1662 (June 28, 1993). However, the court of appeals concluded that a sentence of probation does not equate to a sentence of incarceration. Probation is a punishment of entirely different degree than imprisonment. Id. Probation, has traditionally been viewed not as a sentence of punishment, but a "period of grace" or "a conditional liberty." Clay, 982 F.2d at 962. The court of appeals in Granderson stated that probation and imprisonment are not fungible. Granderson, 969 F.2d at 984. Given the traditional understanding of probation, the onus was on Congress to make it absolutely clear where "sentence" is to refer to a sentence of probation, by including the appropriate modifying pre-positional phrase or making the meaning absolutely clear from the context. Clay, 892 F.2d at 962.

The appellate court in Clay concluded that 18 U.S.C. § 3565(a) is an ambiguous statute and therefore followed the decisions of this Court in applying the policy of lenity. As this Court has stated,

> this policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on nor more than a guess as to what Congress intended.

Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958). As applied to this case, the court of appeals indicated that the policy of lenity dictated that the court err on the side of the lesser penalties by interpreting "original sentence" to refer to the original sentencing guidelines imprisonment range. Clay, 982 F.2d at 965.

Furthermore, the court of appeals in Clay evaluated policy based arguments in construing 18 U.S.C. § 3565(a). The Court noted that by *requiring a court to impose a sentence of imprisonment at least* one-third of the original sentencing guideline maximum imprisonment term furthers the goal of the anti-drug abuse amendment insofar as it builds a floor below which a sentencing judge may not go upon a defendant's revocation of probation for possession of a controlled substance (emphasis added). Id. at 964; Gordon, 961 F.2d at 433, n.8. Secondly, it recognized that its view and interpretation of the statute maintained the integrity of the United States Sentencing Guidelines. Pursuant to 18 U.S.C. § 3553(b) (1988), the district court must impose a sentence upon a defendant within the sentencing guideline range,

> unless the court finds that there exist an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that

> should result in a sentence different from that described.

In order to depart from the guideline, the district court, at the time of sentencing, must provide a short clear written statement or reasoned statement from the bench that identifies the aggravating factors and its reasons for connecting them to the permissible grounds for departure. 18 U.S.C. § 3553(c)(2) (1988); United States v. Feinman, 930 F.2d 495, 501 (6th Cir. 1991) (quoting United States v. Rodriguez, 882 F.2d 1059, 1066 (6th Cir. 1989), cert. denied, 493 U.S. 1084, 110 S.Ct. 1144, 107 L.Ed.2d 1048 (1990). The court of appeals concluded that interpreting "original sentence" to mean original sentence of probation essentially complies with how the sentencing guidelines are to be employed. Clay, 982 F.2d at 965.

It is clear that interpreting a provision of a statute, it is a "fundamental rule of statutory construction that all parts of the statute must be read together." United States v. Gordon, 961 F.2d at 426, 431. Under § 3565(a)(2), "when a court revokes probation, it has the flexibility to structure a new sentence that may include probation, incarceration, fine, and supervised release. In contrast, in the 1988 amendment, Congress emphatically narrowed the court's sentencing discretion by requiring that a *minimum* sentence of one-third of the original sentence must be imposed. The 1988 amendment, implemented as an anti-drug abuse measure, serves a direction to the sentencing judge that probation *shall* be revoked when probation is violated by the defendant's possession of a controlled substance. United States v. Diaz, 989 F.2d at 391,

392. The 1988 Amendment thus establishes a "floor" below which the district court cannot re-sentence despite § 3565(a)(2) otherwise allowing the imposition of *any* sentence within the original sentencing range. Id. See also Gordon, 961 F.2d at 431. The lower court's decision in this case is a well-reasoned interpretation of 18 U.S.C. § 3565(a) [1988 and Supp. III (1991)], consistent with prior decisions of this Court, and relying upon sound public policy and common sense considerations. Writs of certiorari are a matter of grace, and the court's decision below should not be disturbed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: October 12, 1993

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender

MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent
LaShawn Nichol Clay

NO. 93-52

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

LaSHAWN NICHOL CLAY,

Respondent.

PROOF OF SERVICE BY MAIL

MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent

NO. 93-52

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,

Petitioner,

v.

LaSHAWN NICHOL CLAY,

Respondent.

PROOF OF SERVICE BY MAIL

STATE OF TENNESSEE)
) ss
COUNTY OF DAVIDSON)

I, MARIAH A. WOOTEN, being first duly sworn, deposes and says:

On October 12, 1993, the Brief in Opposition to the United States of America's Petition for a Writ of Certiorari and the Motion for Leave to Proceed in Forma Pauperis and the Declaration of Mariah A. Wooten Regarding Mailing of Petition were

served on all parties required to be served in compliance with Supreme Court Rule 29.3, by depositing the documents, first-class mail, postage prepaid, in a United States mailbox on October 12, 1993, addressed to counsel as follows:

William M. Cohen
Assistant United States Attorney
110 Ninth Avenue South, Suite A961
Nashville, TN 37203-3870
(615) 736-5151

Counsel for Petitioner, United States of America, in Court of Appeals and District Court, and

Drew S. Days, III
Solicitor General
Department of Justice
Washington, DC 20530
(202) 514-2217

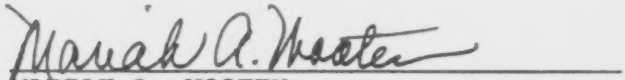
Counsel for Petitioner, United States of America, in the United States Supreme Court.

Served pursuant to Rule 29.4(a)

DATED: October 12, 1993

Respectfully submitted,

HENRY A. MARTIN
Federal Public Defender



MARIAH A. WOOTEN
Deputy Federal Public Defender
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

Counsel for Respondent
LaShawn Nichol Clay